Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NOS. 85-1910 and 85-2094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BUSINESS ELECTRONICS CORPORATION,
Petitioner

v.

SHARP ELECTRONICS CORPORATION

SHARP ELECTRONICS CORPORATION,
Cross-Petitioner

v.

BUSINESS ELECTRONICS CORPORATION

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER PURSUANT TO RULE 22.6

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This supplemental brief is submitted in reply to the brief filed by the United States as *amicus curiae*.

1. *Monsanto* Did Not Decide This Case.

Quite unlike the issue decided in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the petition of Business Electronics Corporation ("BEC") raises the question whether the admittedly collusive termination of a dealer for the purpose of reducing price competition constitutes a per se violation of the Sherman Act. While *Monsanto* addressed the element of conspiracy in a vertical price fixing case, this petition goes the next step and raises the question of conspiracy to do what. By its decision below, the Fifth Circuit rewrote decades of established antitrust jurisprudence by holding that a concerted decision to eliminate a price cutting dealer is not per se unlawful unless it is accompanied by a finding of an express agreement on price.

The Solicitor General misreads *Monsanto*. That decision arose from a dispute in the circuit courts over the type of proof required to establish an inference of conspiracy in a vertical price fixing action. *See id.* at 758-59 and n. 5. The Court resolved that conflict by rejecting the "complaints followed by termination" and the "termination in response to complaints" tests and adopting a standard requiring "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 764. Of the two important distinctions in vertical antitrust cases recognized in *Monsanto*, it was the first one, between concerted and independent action, which was addressed by the Court.

The jury finding of concerted action to eliminate BEC was not questioned by Sharp or the Fifth Circuit, even in light of the *Monsanto* standard. Instead, that court held that collusive termination of a dealer to reduce price competition is a per se violation only if there is an additional, express finding of a direct agreement on resale prices. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1216 (5th Cir. 1986).

2. *Monsanto* Has Not Abated the Conflict in the Courts of Appeals.

Because the Court was not presented with this question in *Monsanto*, it is not surprising that *Monsanto* has not abated the pronounced conflict in the circuits. As discussed in the supplemental brief filed by Sharp, the standard for determining a per se unlawful vertical price fixing agreement continues to vary widely by geography.

Accordingly, certiorari should be granted to review the question presented by BEC's petition, and, for the reasons discussed in BEC's brief in opposition to Sharp's cross-

petition, certiorari should be denied to Sharp's cross-petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 1st day of June, 1987, a true and correct copy of the above and foregoing instrument was forwarded by certified mail, return receipt requested to the following counsel of record:

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